STATE OF MICHIGAN

COURT OF APPEALS

B. MICHAEL GRANT, C.P.A.,

Plaintiff-Appellee,

v

MARK A. BANK and JOHN F. SCHAEFER,

Defendants-Appellants,

and

ELHAM SHAYOTA,

Defendant.

UNPUBLISHED
February 21, 2003

No. 233054
Wayne Circuit Court
LC No. 00-035177-NZ

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendants Mark A. Bank and John F. Schaefer appeal by leave granted from the trial court's order denying their motion for summary disposition in this defamation action. We reverse and remand.

I. Basic Facts And Procedural History

This defamation action arises out of an underlying divorce case between Elham Shayota and her husband Mofak Shayota. Bank, an attorney with Schaefer's law firm, represented Ms. Shayota. In January 1999, the trial court in the divorce action appointed plaintiff Michael Grant, a certified public accountant, to act as an independent expert with regard to the valuation of Sigma Associates, a company Ms. Shayota owned. Apparently, the experts Mr. and Ms. Shayota had individually retained to provide a value for the business as it existed on December 31, 1996, provided vastly different valuations. Accordingly, the trial court ordered Grant to appraise the fair market value of the company stock Ms. Shayota owned as of December 31, 1996, "us[ing] the same information utilized" by the parties' experts to arrive at their differing valuations. Instead, in October 1999, Grant placed an advertisement in *Crain's Detroit Business* listing a company for sale. The small, text-only advertisement said:

ENGINEERING/ARCHITECTURAL FIRM
Gross $4.5 M, net $750 K. Owner retiring/relocating[.] $3M
plus receivables of $1.5M. Cash out preferred.
Send offer/inquiries to: Box #4880

As Grant later explained in writing, he hoped that, by soliciting offers to purchase the business, he might obtain "external data" relevant to valuation, despite the trial court's limitation that he only use the information the other experts used to reach their valuations.

Grant informed Bank of the advertisement in October 28, 1999, prompting a terse, two-sentence reply from Bank on the same day:

> I am in receipt of your correspondence dated October 28, 1999. You are hereby advised that said letter along with your other negligence and misconduct will form the basis of the malpractice case and professional grievance to [be] filed against you.

Apparently reconsidering the brevity of the first letter, Bank sent a second letter that same day:

> From your correspondence dated October 28, 1999, it is apparent that you have recklessly divulged confidential proprietary information regarding Sigma Associates with which you were entrusted by Judge Schnelz as a fiduciary. Please be advised that I will be seeking a temporary restraining order enjoining you from taking any further action in this case. You are hereby warned not to take any further action relative to the dissemination of information about Sigma Associates or the sale of Sigma Associates until the Court has ruled on this issue. You will be held personally liable for all of your actions. Based on your own calculations, the damages may be in the range of $2,500,000.00 to $3,500,000.00.

Bank circulated both of these letters to others involved in the divorce case. These other individuals included his client, Ms. Shayota, and her experts, as well as Mr. Shayota's attorney. Bank evidently did not circulate the letters to anyone else.

On January 21, 2000, after the trial court learned that Grant had exceeded the scope of the task assigned to him, the trial court *sua sponte* entered an order dismissing Grant as an expert. Nevertheless, on April 10, 2000, Grant sent a letter to Stephen D'Arcy. D'Arcy worked at Price Waterhouse Coopers, an accounting firm Ms. Shayota had hired to provide a valuation of Sigma Associates, and supervised the accountants who had performed the valuation on behalf of Ms. Shayota. In the letter Grant represented that the trial court had appointed him "to value the company," but did not mention that the trial court had dismissed him from assisting in the case. The letter also advised D'Arcy that the accounting firm's valuation of the company was erroneous in a number of respects and that the firm should "recall" the valuation report as soon as possible because the divorce action was scheduled for trial. Bank learned of this contact with D'Arcy, and then sent Grant a letter on April 12, 2000:

> I am in receipt of your April 10, 2000, correspondence to Stephen R. D'Arcy. As you know, Judge Schnelz has terminated your services in this matter. You must immediately stop interfering with the parties and their experts. Your April 10, 2000, correspondence can at best be described as witness tampering. Cease and desist immediately.

As with the other letters he sent Grant, Bank sent copies of this letter to Ms. Shayota and others involved in the divorce action.

Grant later brought this action, alleging that Bank's letters were defamatory. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied the motion, concluding that there was a question of fact regarding whether the alleged defamatory statements were protected by an absolute or qualified privilege.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision concerning a motion for summary disposition.[1]

B. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.[2] When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.[3] The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial.[4]

C. Qualified Privilege

A qualified privilege "'extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty.'"[5]

> The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only.[6]

It is possible to "overcome a qualified privilege only by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth."[7]

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] *Id.*

[3] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

[4] *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

[5] *Timmis v Bennett*, 352 Mich 355, 366; 89 NW2d 748 (1958), quoting *Bacon v Michigan Central Railroad Co*, 66 Mich 166, 170; 33 NW 181 (1887).

[6] *Prysak v RL Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992).

[7] *Id.*

However, "[g]eneral allegations of malice are insufficient to establish a genuine issue of material fact."[8]

In this case, Grant's allegations of malice are completely unsupported. The record provides no basis from which to conclude that Bank's statements were made in anything but good faith to support Ms. Shayota's interest regarding the pivotal valuation issue. Bank's statements were directly responsive to the situation that Grant had created by flagrantly disobeying the court order limiting the scope of his business analysis as well as the court order dismissing him from any additional participation in the divorce case. In his letters, Bank focused his rhetoric on informing Grant that he had overstepped his boundaries by a mile, not an inch, a conclusion in which the trial court in the divorce action evidently concurred by taking the unusual step of dismissing Grant *sua sponte*. Bank also concentrated on convincing Grant not to engage in any further improper activity outside the scope of the trial court's orders. Bank disseminated the letters only to the small number of individuals directly involved in the valuation aspect of the divorce action either as parties, or attorneys and experts. The record left no factual question concerning whether this conduct fell squarely within a qualified privilege. Thus, the trial court erred in denying defendants' motion for summary disposition. Having resolved the case on this basis, we need not consider whether the letters were also subject to an absolute privilege.

Reversed and remanded for the trial court to enter an order granting summary disposition to defendants. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[8] *Id.*